Dato' Mohamed Anuar bin Embong v Ing Merchant Bank (Singapore) Ltd (formerly known as Internationale Nederlanden Merchant Bank (Singapore) Ltd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–546 OF 1999
KAMALANATHAN RATNAM J
9 JUNE 2000

Civil Procedure *— Res judicata — Commencement of suit after interlocutory judgment entered against plaintiff — Earlier interlocutory judgment entered not on merits, whether res judicata apply — Whether plaintiff had raised present claim either by way of counterclaim or separate suit in earlier proceedings*

The first defendant was a Singapore merchant bank carrying on business in Singapore. The second defendant was the first defendant's management arm with a place of business in Singapore. Relationship between the plaintiff and the defendants began in 1993 with the execution of three agreements between them. There was no dispute that the plaintiff did avail himself of the banking facilities given by the first defendant and went into default. The first defendant applied for summary judgment against the plaintiff in the Singapore High Court. The plaintiff was granted conditional leave to defend. The condition was that the plaintiff had to deposit RM2m into court. The plaintiff failed to do that and accordingly the defence was struck out and interlocutory judgment entered against the plaintiff. Subsequently the plaintiff commenced this suit against the defendants in the Kuala Lumpur High Court. The defendants applied to set aside the notice of writ on the grounds of res judicata and forum non convenience. The plaintiff submitted that the suit was grounded upon a series of dealings which transpired between the defendants' representatives and the plaintiff in Malaysia. The plaintiff had never visited the defendants' offices in Singapore. The entire dealings were concluded in Malaysia. The plaintiff also submitted that his cause of action in Malaysia was distinct and independent of the Singapore proceedings. The senior assistant registrar dismissed the defendants' application. The defendants appealed.

Held, dismissing the appeal:

(1) The proceedings in Singapore based on the three agreements was solely to recover a debt due and owing from the plaintiff to the first defendant only. The plaintiff had not at any point of time raised his present claim either by way of counterclaim or by a separate suit in the Singapore proceedings. The plaintiff had merely averred these matters amongst others in his affidavit to oppose the application for summary judgment. It was not a claim for redress as such and no adverse findings ought to be made against the plaintiff simply because he had averred these matters in his affidavit in Singapore (see p 470G–H).

(2) The interlocutory judgment was obtained against the plaintiff not on the merits of the proceedings in Singapore but merely because the plaintiff failed to provide the security of RM2m. In the circumstances there was no question of res judicata arising at all (see p 471B–C).

(3) For res judicata to arise there must be a judgment on the issues that are before the court and an order giving leave to defend is not a judgment. It is a decision that there should not be judgment for the plaintiff. An order giving leave to defend as granted to the plaintiff by the Singapore High Court was not a judgment but a decision (see p 471E–F); *United Commercial Bank v Yap Cheng Hai & Ors* [1980] 1 MLJ 207 followed.

(4) In order to obtain summary judgment in Singapore, the first defendant admitted that the plaintiff's cause of action, if any, for alleged breaches of the agreement was a 'completely different entity' and was 'completely distinct'. Having contended in like manner, it did not behove the defendants to now contend that all these matters pleaded in the present statement of claim should have been raised in the proceedings in Singapore. Clearly the defendants were guilty of approbation and reprobation and the court would not condone it (see p 474A–D).

(5) Since the plaintiff's claim filed in this court was based on the representations made between the first defendant's representatives and the plaintiff and since a new party, namely the second defendant was also being included and since all the representations were made in Malaysia and since the plaintiff had never visited the defendants' offices in Singapore, this claim ought properly to be heard in Malaysia and this court was the proper forum conveniens. The plaintiff resided in Malaysia and the shares complained of were all quoted in the Kuala Lumpur Stock Exchange which were within this court's jurisdiction. Further, the witnesses for the plaintiff would be from Malaysia and the defendants' main witnesses were all too familiar with Malaysia (see p 474E–H).

[Bahasa Malaysia summary

Defendan pertama adalah bank perdagangan Singapura yang menjalankan perniagaan di Singapura. Defendan kedua adalah bahagian pengurusan defendan pertama dengan tempat perniagaan di Singapura. Hubungan antara plaintif dan defendan-defendan bermula pada tahun 1993 dengan pelaksanaan tiga perjanjian antara mereka. Tiada pertikaian bahawa plaintif menggunakan kemudahan-kemudahan perbankan yang diberikan oleh defendan pertama dan ingkar untuk membayar. Defendan pertama memohon untuk penghakiman terus terhadap plaintif di Mahkamah Tinggi Singapura. Plaintif diberikan kebenaran bersyarat untuk membuat pembelaan.

A Syaratnya adalah bahawa plaintif mestilah mendepositkan RM2 juta di mahkamah. Plaintif gagal untuk berbuat demikian dan dengan itu pembelaan tersebut dibatalkan dan penghakiman interlokutori dimasukkan terhadap plaitnif. Kemudian plaintif memulakan tindakan ini terhadap defendan-defendan di Mahkamah Tinggi Kuala Lumpur. Defendan-defendan memohon untuk mengetepikan notis
B writ atas alasan-alasan res judicata dan forum non convenience. Plaintif menghujahkan bahawa tindakan tersebut adalah berdasarkan siri-siri urusan yang berlaku antara wakil defendan-defendan dan plaintif di Malaysia. Plaintif tidak pernah melawat pejabat defendan di Singapura. Keseluruhan urusan telah disempurnakan di Malaysia.
C Plaintif juga menghujahkan bahawa kausa tindakannya di Malaysia adalah berasingan dan bebas dari prosiding-prosiding di Singapura. Penolong kanan pendaftar menolak permohonan defendan. Defendan merayu.

Diputuskan, menolak rayuan tersebut:

D (1) Prosiding-prosiding di Singapura berdasarkan tiga perjanjian tersebut adalah bertujuan semata-mata untuk mendapat kembali hutang yang tertunggak dan kena dibayar daripada plaintif kepada defendan pertama sahaja. Plaintif tidak pada sebarang masa sekali pun membangkitkan tuntutan ini sama ada melalui tuntutan balas
E atau melalui tindakan yang berasingan di dalam prosiding-prosiding di Singapura. Plaintif hanya mengesahkan perkara-perkara ini antara lain di dalam afidavitnya untuk menentang permohonan untuk penghakiman terus. Ia bukanlah tuntutan untuk tebus rugi dan tiada penemuan bertentangan patut dibuat terhadap plaintif semata-mata kerana beliau menegaskan
F perkara perkara tersebut di dalam afidavitnya di Singapura (lihat ms 470G–H).

(2) Penghakiman interlokutori telah diperoleh terhadap plaintif bukan atas merit prosiding-prosiding di Singapura tetapi hanya semata-mata plaintif gagal untuk memberikan jaminan RM2 juta.
G Di dalam keadaan-keadaan tersebut, tidak terdapat persoalan res judicata yang timbul langsung (lihat ms 471B–C).

(3) Untuk res judicata berbangkit mestilah terdapat penghakiman atas isu-isu di hadapan mahkamah dan suatu perintah memberikan kebenaran untuk membela bukanlah suatu
H penghakiman. Ia adalah keputusan bahawa tidak sepatutnya terdapat penghakiman untuk plaintif. Suatu perintah memberikan kebenaran untuk membela seperti yang diberikan kepada plaintif oleh mahkamah Singapura bukanlah suatu penghakiman tetapi suatu keputusan (lihat ms 471E–F); *United Commercial Bank v Yap Cheng Hai & Ors* [1980] 1 MLJ 207
I diikut.

(4) Untuk memastikan agar penghakiman terus diperolehi di Singapura, defendan pertama telah mengaku bahawa kausa

tindakan plaintif, jika ada, untuk pengataan-pengataan pelanggaran perjanjian adalah 'entiti yang langsung berasingan' dan 'berbeza sepenuhnya'. Oleh kerana telah menegaskan dengan cara tersebut, adalah tidak terbuka kepada defendan-defendan untuk sekarang menegaskan bahawa perkara-perkara tersebut yang diplidkan di dalam pernyataan tuntutan sekarang sepatutnya dibangkitkan di dalam prosiding-prosiding di Singapura. Dengan jelas defendan-defendan menerima apa yang baik saja dan mengetepikan yang buruk dan mahkamah tidak akan membenarkannya (lihat ms 474A–D).

(5) Oleh kerana tuntutan plaintif yang difailkan di mahkamah ini adalah berdasarkan representasi-representasi yang dibuat antara wakil-wakil defendan pertama dan plaintif dan oleh kerana pihak yang baru iaitu, defendan kedua juga dimasukkan dan oleh kerana semua representasi-representasi adalah dibuat di Malaysia dan oleh kerana plaintif tidak pernah melawat pejabat defendan-defendan di Singapura, tuntutan ini sepatutnya didengar di Malaysia dan mahkamah ini adalah forum conveniens yang sesuai. Plaintif telah tinggal di Malaysia dan saham-saham yang diadukan semuanya dinyatakan di dalam Bursa Saham Kuala Lumpur yang di bawah bidang kuasa mahkamah. Selanjutnya, saksi-saksi untuk plaintif akan datang dari Malaysia dan saksi-saksi utama defendan adalah amat biasa dengan Malaysia (lihat ms 474E-H).]

Notes

For cases on res judicata generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3959–4032.

Cases referred to

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 (refd)

Len Min Kong v United Malayan Banking Corp Bhd & another appeal [1998] 2 MLJ 478 (refd)

Tan Swee Hoe Co Ltd v Ali Hussein Bros [1980] 2 MLJ 16 (refd)

United Commercial Bank v Yap Cheng Hai & Ors [1980] 1 MLJ 207 (folld)

Vervaeke v Smith [1982] 2 All ER 144 (refd)

Legislation referred to

Matrimonial Causes Act 1973 s 45(1) [Eng]

Rules of the High Court 1980 O 11, 14

Rules of the Supreme Court O 15 r 16 [Eng]

Cyrus Das (*Kunna Sinniah* with him) (*David Chong & Co*) for the appellants/defendants.

V Sivaparanjothi (*Ch'ng Kim Hock* and *Ashokvijay J Sanghrajka* with him) (*V Siva & Partners*) for the respondent/plaintiff.

Kamalanathan Ratnam J:

The appeal

This is an appeal by the defendants against the decision of the learned senior assistant registrar ('SAR') refusing the defendants' application (encl 14) to set aside a notice of service of the writ out of jurisdiction on the defendants/appellants in Singapore and/or alternatively to adjourn the proceedings on the grounds that this court is not the forum conveniens.

Facts

The first defendant is a Singapore merchant bank carrying on business in Singapore without a place of business in Malaysia. The second defendant is the first defendant's management arm, with a place of business in Singapore but without a place of business in Malaysia. Relationship between the plaintiff and the defendants began in 1993 with the execution of three agreements between them. These were two facility agreements dated 22 April 1993 ('the first agreement') and 8 November 1994 ('the second agreement'). Pursuant to these two agreements, the first defendant, with whom these agreements were signed, provided banking facilities to the plaintiff to invest in the stock market in Singapore and Malaysia. The third agreement dated 28 April 1993 was between the plaintiff and the second defendant and it was called an Investment Advisory Agreement. There is no dispute that the plaintiff did avail himself of the banking facilities given by the first defendant and then went into default. As a result the defendants on 23 March 1998 commenced a recovery action against the plaintiff in the High Court in Singapore for RM9,412,742.98. The plaintiff entered unconditional appearance on 6 April 1998 and filed his defence on 20 July 1998. The first defendant applied for summary judgment on 19 August 1998. The plaintiff filed an affidavit opposing the O 14 application on 10 September 1998.

After hearing arguments on 7 October 1998, the Assistant Registrar of the High Court in Singapore granted conditional leave to defend. The condition was that the plaintiff had to deposit RM2m into court by 4 November 1998. The plaintiff failed to do that and accordingly the defence was struck out and interlocutory judgment entered against the plaintiff on 19 November 1998. About ten months later the plaintiff, on 29 September 1999, commenced this suit against the defendants in the Kuala Lumpur High Court. The defendants entered conditional appearance and applied to set aside the notice of writ on 18 November 1999 and the application was dismissed by the learned SAR on 14 February 2000. Hence this appeal before me.

Case for the defendants

Dr Das for the defendants argued that this suit before me is premised on the very same transactions that were in issue in the Singapore proceedings, namely, the two facility agreements and the management agreement and matters relating thereto. Dr Das further argued that the said notice of writ ought to have been set aside under O 11 of the Rules of the High Court 1980 ('the RHC') on grounds of jurisdiction, namely, that this court is forum non conveniens. He also urged the court to consider res judicata in the wider sense on the ground that all issues ought to have been brought out and litigated at one go in the proceedings in Singapore.

Case for the plaintiff

Dato' Siva arguing for the plaintiff submitted that the plaintiff's suit herein is grounded upon a series of dealings which transpired between the defendants' representatives, namely, one Mr Koo Kin Leong, the Associate Director of the first defendant ('Koo'), and Ms Evelyn Teah, the Senior Accounts Manager of the first defendant ('Teah') and the plaintiff, in Malaysia. The plaintiff had never visited the defendants' offices in Singapore. The entire dealings were concluded in Malaysia. He thus pointed out that the omissions which constituted the breaches as alleged by the plaintiff took place in Malaysia. Dato' Siva vehemently argued that the plaintiff's case before me did not arise out of the three agreements earlier referred to, and which agreements indeed were the subject matter of the proceedings in Singapore. It was urged upon me that the plaintiff's cause of action in Malaysia is distinct and independent of the Singapore proceedings.

Findings of the court

Representations made by defendants

Dato' Siva referred the court to various 'call reports', made by Koo for the defendants, and to the plaintiff's letter dated 15 July 1995 to the defendants. It is necessary to reproduce the 'call report' dated 5 June 1996 from Koo to the first defendant:

> For circulation: WFN / ET / EG / RS / JT / OJN / HQ / IP / 1A
>
> Visited Dato' Embong to discuss the delinquent account. Dato' apologizes for not having maintained contact as he was attending to the birth of his son and his own subsequent illness.
>
> He informed the bank that he is still interested in salvaging the account and due to the unpredictability of his dividend flow, a commitment of MR100,000 per month would be difficult to adhere to. On average, he receives about MR1,700,000 gross a year from investment income, bumiputra allocations etc and he is committed to repayment of at least MR1.0m a year to the Bank. He commits payments MR200,000 in July (postdated cheque provided) and a further MR300,000 by October 1995.

Further, Dato' informs that he has a shareholding of 10% in a company called Espirit Sdn Bhd which has applied for a listing on the KLSE. In addition, he has a further option of 15% bringing the total to 25% or about 5 mio shares. Proposed IPO price is about MR2.50 or a prospective PER of 6x earnings. The company is engaged in civil engineering with MR500m contracts in the books.

On 12 June 1995, Dato' will sign with the Chief Minister of Malacca on behalf of the company another contract to reclaim 500 acres off Malacca. This contract carries a value of MR500m. We asked for assignment of IPO profits due to him on his shareholding since he expects that the company should be floated before year-end. Dato' is agreeable and has provided a letter to the bank for that purpose. He is further agreeable to a firm letter of commitment drafted by lawyers.

Dato' also informs that he holds 60% of the shareholding of a service company which supplies Petronas with diesel fuel. Currently, due to lack of working capital, the company supplies 20% of their allocated order (100,000 litres compared with 500,000 litres). Writer suggested that ING Bank could help by way of a guarantee to a local bank to provide funding against Petronas payment directly to ING provided profits are kept in ING Singapore to repay the account. Dato' is keen to explore.

Dato' also informs that two other projects in Trengganu have been approved for development but it is difficult for us to visualise. He requests that Mr Nagel and/or KKL visit the state and Redang to get a feel for his business projects. This should provide us further comfort.

On his portfolio, he requests the bank to assist in the monitoring and he is open to our suggestions to restructure the portfolio.

Follow-up

(1) Examine the portfolio further for rationalisation: ET to discuss with KKL.

(2) Formalise an agreement on the IPO shares. ET please coordinate with Risk Management.

(3) Discuss ING Bank's risk relevance on the account — Risk Management, Mr Nagel and KKL.

(4) Others — KKL

The full 'call report' dated 7 June 1996 reads as follows:

I visited the client whose account is still delinquent. However, his shareholding in Espirit which we decline to finance is now worth some money. Updates received were:

(a) He has been given options in three companies at the pre-IPO stage; each of them 20% of the company's final IPO share capital. The companies are involved in chemical trading, manufacturing and sawmilling. He expects them to be listed in the next 12 months.

(b) The 2m shares of Espirit which is under moratorium is currently being financed by Arab Malaysian Bank. Total facility granted to the client is RM5.0 mio; out of which RM4.0 mio was drawn to pay for the shares (exercising the option at RM2.0 per share) with the balance RM1.0 mio for interest accrual and payments to ING Bank.

(c) Client has committed payments to the Bank amounting to RM680,000 until August 1996.

(d) Client offers that we should consider refinancing 1 million shares of Espirit Corporation at RM3.00 per share, paying off Arab Malaysian Bank. That way, our position will be as follows:-

	Current	Refinanced
Loan	SGD8,920,000	SGD10,615,000
Portfolio	SGD5,620,000	SGD10,705,000
Advance Margin	159%	99%
Gap	SGD3,300,000	0

The moratorium for the shares should be lifted by Q3 1996. However, there will be a forthcoming rights issue on the shares for which a further loan may be required.

(e) Client has re-signed the option agreement; however, the option price has been revised to RM3.00 per share.

The relevant part of 'call report' dated 6 October 1996 reads as follows:

Author visited Dato' Embong. Salient points of the meeting were as follows:

...

(1) On the proposed floatation of Espirit, Dato' informs that the Securities Commission have requested for audited accounts for period ending 30 September 1995. Plans by merchant bankers are to submit this to the Securities Commission by 15 October 1995, following which approval for listing should be secured. However, in the current weak market state, Dato' believes that a delay may not be a bad thing.

(2) Dato' signed a Call Option Agreement favouring ING Bank. The Bank has the right to purchase all the shares he owns upon listing of Espirit, at the Initial Public Offering Price, hence providing all the upside to the bank.

(3) Dato' informs that he will arrange a further MYR100,000 for October towards his obligations to ING Bank.

Finally the letter from the plaintiff to the first defendant dated 15 July 1995 also needs to be reproduced. It reads as follows:

15 July 1995 COURIER/FAX

Internationale Nederlanden Asset Management (S) Ltd
50 Raffles Place
#34-01/06 Shell Tower
SINGAPORE 0401

Attn: Mr Koo/Ms Evelyn Teah

Dear Sir/Madam

Margin Account

I refer you to the discussions held on several occasions in the last three months between your goodself and the undersigned regarding the above. In each of

A those discussions, you have consistently assured me that the bank will not force-sell any of the shares in my margin account except to buy other stocks which in the opinion of the bank, would perform better than the ones sold.

However, to my surprise, in the last two weeks, the bank had sold the entire NBT shares, Seng Hup and S & P Food shares and did not utilise the full proceeds of the sale to buy other stocks as agreed. The sale was done at a B cost much below the purchase price resulting in a big loss to me. To make matters worse, the price of the shares sold started to appreciate immediately after they were sold, and in the case of NBT shares in particular, the share price kept climbing up.

In the light of this experience, can I now expect that the bank will not repeat the same mistake in the future.

C Thank you.

Yours faithfully,

Sgd.

It is the plaintiff's case that the suit before me is grounded upon D representations made by Koo and Teah to the plaintiff in Malaysia. I also note that neither of these two representatives have filed any affidavits to rebut the representations relied on by the plaintiff. In any event perusing the affidavits filed so far by the defendants I find that there is no traverse of these details. In *Tan Swee Hoe Co Ltd v Ali Hussein Bros* [1980] 2 MLJ 16 Raja Azlan Shah CJ (Malaya) (as His Highness then was) said at p 18:

E Although it is trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is by invoking the doctrine of collateral contract or collateral warranty. *Chitty on Contracts* (24th Ed) (para 674) put it this way:

> 'An assurance given in the course of negotiation may therefore give rise F to a contractual obligation, provided that an intention to be bound can be shown. The rules of evidence, however, frequently prevent such an assurance from being incorporated as part of a subsequent written agreement, since extrinsic evidence is as a general rule not admissible to vary or add to the terms of a written contract. As a result, the courts have been prepared in some circumstances to treat the assurance as a separate contract, collateral to the main transaction. In particular, they will do so G where one party refuses to enter into the contract unless the other gives him an assurance on a certain point.'

In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts.

H Reaffirming this principle the Court of Appeal in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788 said at p 799:

... It is trite that the device of a collateral contract is one of the methods employed by the law to impose liability for a statement made in the course of negotiations preceding the making of a contract. Very recently, in *Shah Alam* I *Properties v Abdul Razak Abu Samah* (Civil Appeal no 03-43-98, unreported) this court has set out the propositions of law that operate in the environment of pre-contractual statements. I find it unnecessary to repeat what was there said.

Further in *Len Min Kong v United Malayan Banking Corp Bhd & Anor Appeal* [1998] 2 MLJ 478, the Court of Appeal again relying on the same judgment of Raja Azlan Shah CJ (Malaya) quoted him at p 19 as follows:

> In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

The Court of Appeal then expressed its views on this matter this way at p 495. It said:

> ... a guarantor who invokes the benefit of the section is not confined to the four corners of the contract of guarantee when seeking to establish the existence of the contract of which the section speaks. He is at liberty to adduce evidence *aliunde* to demonstrate that there existed an arrangement between the parties that made his liability under the guarantee depend upon the execution of the guarantee by another guarantor.

Having perused the call report dated 6 October 1996 and the plaintiff's letter to the first defendant dated 15 July 1995 I find that the plaintiff has raised relevant issues leading to an arguable case for the court to consider whether there is substance in his argument of the existence of a collateral promise. The plaintiff had in fact signed the call option agreement and admittedly in the words of Koo in his 'call order' dated 6 October 1996, 'The bank has the right to purchase all the shares he (the plaintiff) owns upon listing of Espirit, at the Initial Public Offering Price, hence providing all the upside to the bank.' Whilst I agree that it is not for this court to decide at this stage whether there is a collateral agreement that the plaintiff can rely on, suffice it for me to hold that the plaintiff has raised an arguable case that warrants this court to proceed to hear this case.

The proceedings in Singapore

The proceedings in Singapore based on the three agreements was solely to recover a debt due and owing from the plaintiff to the first defendant only, amounting to RM9,412,742.98. I agree with the plaintiff's submission that he had not at any point of time raised his present claim either by way of counterclaim or by a separate suit in the Singapore proceedings. The plaintiff had merely averred these matters amongst others in his affidavit to oppose the application for summary judgment. It was not a claim for redress as such and no adverse findings ought to be made against the plaintiff simply because he had averred these matters in his affidavit in Singapore. I agree that it would be entirely different if the plaintiff had made a claim upon these matters in Singapore.

Res judicata

The salient points of the order of the assistant registrar of the High Court in Singapore given on 7 November 1998 were that:

(1) the plaintiff be granted leave to defend the Singapore suit upon provision of security in the sum of MYR2,000,000 by way of banker's guarantee drawn in favour of the defendant's solicitors or nominees in Malaysia by 4 November 1998; and

(2) in the event of the plaintiff's failure to comply with order 1 above, the plaintiff's defence be struck out and interlocutory judgment be entered without further order for the defendant with damages to be assessed.

Hence the interlocutory judgment was obtained against the plaintiff, not on the merits of the proceedings in Singapore but merely because the plaintiff failed to provide the security of RM2m. It was because of this failure to provide the required security that the plaintiff's defence was struck out and interlocutory judgment entered. In the circumstances, it is my judgment that there is no question of res judicata arising at all. I am fortified in holding this view by relying on the decision in *United Commercial Bank v Yap Cheng Hai & Ors* [1980] 1 MLJ 207 where the plaintiffs claimed against the defendants on a document which they alleged was either an indemnity given by the defendants to the plaintiffs or alternatively that the document was a guarantee. In an earlier action, the plaintiffs had claimed against the defendants on the same document but solely on the ground that the document was a guarantee. In that action only the second defendant had been served with the proceedings. The plaintiffs then took out an O 14 application for summary judgment against him. Leave to defend was granted. The next event in that action was that the plaintiffs discontinued it and brought the present action in which the claim was in the alternative against the defendants. The issue before the court was whether the plea of res judicata did apply. The court held that for res judicata or estoppel by record to arise, putting the matter broadly, there must be a judgment on the issues that are before the court, and an order giving leave to defend is not a judgment. It is a decision that there should not be judgment for the plaintiffs.

I agree that an order giving leave to defend is not a judgment but a decision.

Comity principle

Dr Das sought to argue his case resting on the comity principle in that there must be a mutual recognition by nations of the laws and customs of others. For this he relied upon the House of Lords decision in *Vervaeke v Smith* [1982] 2 All ER 144. To understand this case it is necessary to set out the facts.

In 1954 the petitioner, who was born in Belgium and resided there until 1954, went through a ceremony of marriage in London with the respondent, who was a domiciled Englishman. On 12 March 1970, the petitioner went through another ceremony of marriage in Italy with M who died that day leaving real property in England. If the petitioner's marriage to M was valid she was entitled to share in that property. By a petition dated

29 May 1970 filed in the Family Division of the High Court, the petitioner prayed for a declaration that her marriage to the respondent was null and void on the ground that she had not consented to it because she was ignorant of the true nature of the ceremony. A member of M's family intervened in the proceedings to contest the relief sought. On 7 May 1971, Ormrod J dismissed the petition on the ground that the petitioner knew that the 1954 ceremony was a marriage ceremony and had consented to it. On 6 December 1971, the petitioner, who had returned to Belgium in May 1970 and been resident there for 18 months, began proceedings in a Belgian court seeking a declaration that the 1954 marriage was a nullity ab initio on the alternative pleas that: (i) she had not consented to the marriage through ignorance of the true nature of the ceremony; or (ii) it was a mock marriage, or mere formality, not accompanied by the parties' intention to cohabit, and was contracted solely to enable the petitioner to acquire British nationality and avoid deportation from England. In the Belgian proceedings the respondent admitted the second plea. The intervener again intervened to oppose the relief sought, on the ground that the matter was res judicata by virtue of Ormrod J's decision and that the validity of the 1954 marriage was governed by English law and therefore the same conclusion would be reached in the Belgian court as had been reached by Ormrod J. On 7 March 1972, the petitioner's appeal to the English Court of Appeal from Ormrod J's decision was dismissed by consent. On 9 June 1972 the Belgian Court decreed that the 1954 marriage was void ab initio on the ground that, although the parties had consented to it, it was a mock marriage not intended to constitute a lifelong community between them and, as such, was invalid under Belgian law. The court rejected the petitioner's plea of lack of consent to the marriage. The intervener appealed to a Belgian Appeal Court, which on 27 April 1973 dismissed the appeal, holding that the plea of lack of consent to the marriage was barred by the res judicata afforded by Ormrod J's decision but that the plea of a mock marriage was not res judicata since it had not been argued before Ormrod J. The court accordingly upheld the latter plea, thus rendering the marriage invalid under Belgian law. By a petition in the High Court in England dated 7 September 1973 the petitioner sought as against the respondent a declaration under O 15 r 16 of the Rules of the Supreme Court (England) that the Belgian decree was entitled to recognition in the English courts and by a further petition the petitioner applied under s 45(1) of the Matrimonial Causes Act 1973 ('the Act') for a declaration that her marriage to M was valid and subsisting at the date of his death. Members of M's family intervened in both petitions to oppose the relief claimed in them. On 8 May 1979, Waterhouse J dismissed both petitions and his decision was affirmed by the Court of Appeal. The petitioner appealed to the House of Lords.

The appeal failed in limine with the House of Lords holding that the decision of Ormrod J that the English marriage was not rendered invalid on the ground of absence of consent was a decision on the point at issue in the Belgian courts, that is, the question of the right to have the English marriage declared void, and therefore, since the matter in dispute in the Belgian proceedings had, prior to the date of the Belgian judgment, been the subject

of a final conclusive judgment by a court having jurisdiction (that is the English court), the issue was then res judicata and the Belgian judgment could not be recognized by the English courts, on the ground of cause of action estoppel. With respect to the petitioner's application under s 45 of the Act for a declaration that the Italian marriage was valid, although she only was debarred by Ormrod J's judgment by what was technically 'issue estoppel' rather than 'cause of action estoppel' from asserting in an English court that the English marriage was void, she was still precluded from relying on the Belgian judgment that the English marriage was invalid, since the validity of the English marriage went to the root of the question which she had to prove in order to establish the validity of the Italian marriage, that is, that the Italian marriage was not contracted at a time when the English marriage was still subsisting.

It is clear therefore that this is a case resting more on res judicata and on that basis it was appropriate to apply the comity principle. The defendants therefore in my view had to cross the res judicata hurdle before seeking to apply the comity principle. I had already found that the principle of res judicata cannot apply to this case as notwithstanding the fact that the plaintiff herein had in his affidavit raised some of the issues he had raised here, the first defendant, being the plaintiff in the Singapore suit had in effect muzzled this plea before me by arguing in the Singapore Court that these issues ought not to have been raised in the Singapore suit. Since I do not have the benefit of a written judgment from the assistant registrar of the High Court of Singapore, I do not know if the court had or had not accepted this submission by the first defendant. In any case, it is my judgment that the first defendant cannot approbate and reprobate.

Approbation and reprobation by the defendants

To illustrate that the defendants were blowing hot and cold the plaintiff referred me to encl 13 exh HQ-8 para 25, which was the affidavit of Tan Hin Huat, the Senior Vice-President of the first defendant and which affidavit was filed in support of the first defendant's O 14 application in the Singapore proceedings. The said paragraph reads as follows:

Paragraph 25 Investment Advisory Agreement:

> As for the line of defence which is summarised in para 15(d) above, it should be noted that the Investment Advisory Agreement was entered into between The defendant and INAM, which is a completely different entity from The plaintiffs. Any disputes which The defendant might have with INAM (which I verily believe is completely baseless anyway) is completely distinct from the plaintiffs' claim and I am unable to see how The defendant proposes to found a defence on this ground. A review of the terms of the Investment Advisory Agreement which has been exhibited at 'THH-5' would clearly show that this was merely an investment advisory agreement by which INAM was appointed as investment advisors to The defendant, which appointment could be cancelled by the defendant by not less than 30 days' written notice. The scope of INAM's duties are provided for in the agreement. The plaintiffs' present action is a simple claim for monies due and owing under a loan facility, which the defendant cannot deny he owes and the Investment Advisory Agreement

> which was signed with a separate entity are irrelevant to this action (even if the defendant's allegations are valid). A

It is obvious therefore that in order to obtain summary judgment in Singapore the first defendant admitted that the plaintiff's cause of action, if any, for alleged breaches of the Investment Advisory Agreement was a 'completely different entity' and was 'completely distinct'. B

Having contended in like manner it does not behove the defendants to now contend that all these matters pleaded in the present statement of claim should have been raised in the proceedings in Singapore. In fact, Harold Quay Kok Wee, the Senior Vice-President of the first defendant, who affirmed encl 13 in support of the defendants' application to set aside the notice of service of writ (encl 14) said as follows at para 14: C

> I am advised by my solicitors and I verily believe that the plaintiff should have brought up this claim, issues or matters or counterclaim in the High Court Civil No 454 of 1998 action filed by the first defendant in the High Court of Singapore. I am further advised that it is an abuse of the process of the court to file this action in this honourable court when the matters have been dealt with and disposed in the High Court Action No 454 of 1998 filed in the High Court of Singapore. D

Clearly the defendants are guilty of approbation and reprobation and this court will not condone it.

E

Forum Conveniens

Since the plaintiff's claim filed in this court is based on the representations made between the first defendant's representatives and the plaintiff and since a new party, namely, the second defendant, is also being included (although there is no separate relief sought against the second defendant), F and since all the representations were made in Malaysia and since the plaintiff has never visited the defendants' offices in Singapore, I am of the view that this claim ought properly to be heard in Malaysia and I hold that this court is the proper forum conveniens. The plaintiff resides in Malaysia and the shares complained of, namely shares of North Borneo Timber Bhd, Seng Hup Electric Co Bhd and S & P Food Industries are all quoted in the G Kuala Lumpur Stock Exchange, which are within this court's jurisdiction. Further the company Expirit Corp Sdn Bhd whose shares the defendants were to have taken over and in respect of which the plaintiff had signed the call option agreement in favour of the first defendant, is registered in Malaysia. Further the witnesses for the plaintiff would be from Malaysia H and the defendants' main witnesses Koo and Teah are all too familiar with Malaysia.

It is therefore my judgment that this action falls within the jurisdiction of this court. The defendants chose to do business with a Malaysian in Malaysia for gain. They made various representations to him to procure his business. A dispute has now arisen wherein the plaintiff alleges that he has I sustained losses as a result of the defendants' acts and/or omissions. The defendants cannot now be heard to say that they do not wish to subject

themselves to the jurisdiction into which they had voluntarily entered for gain.

Another important factor so far as this application goes is that I only have before me affidavit evidence. The subject matter of the plaintiff's suit is founded on a course of dealings with the defendants through their representatives and these representatives have not come forward to rebut any of the plaintiff's allegations. Having considered all factors, I dismissed the appeal with costs.

Appeal dismissed.

Reported by Jafisah Jaafar